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NATURE OF CONTINGENT CONTRACTS IN INDIA AND HOW THEY DIFFER FROM WAGERING AGREEMENTS

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ABSTRACT

This paper essentially aims to portray the nature of contingent contracts in India and to thereby produce clarification on how a contract comes under the definition of contingency. The motive of writing this paper is to not only show how contingent contracts function in India but to also do a comparative study on how a contingent contract differs from a wagering agreement. This study will also explore why certain agreements come under the purview of illegitimacy due to its wagering nature. Why do certain agreements like insurance and indemnity come under the purview of contingent contracts while betting comes under a wagering agreement which is void ab initio? This is the question that this paper essentially aims to look into and answer.

INTRODUCTION

The Indian Contract Act, 1872, Section 2(h) defines a contract as “an agreement that is enforceable by law.” These agreements are of several types and one such type is contingent contracts. Section 31 of the Indian Contract Act defines contingent contracts as a contract to do or not to do an act if some incident, event, or collateral to the said contract does or does not happen. Therefore, a contingent contract is essentially a conditional contract for an uncertain event which will be enforceable by law only if the condition or event agreed upon by both the parties does or does not happen¹. A contingent contract is usually made by contemplating a future event. It can in some instances even account for an event of the past but the uncertainty is with regards to not knowing how it happened. A contract contingent in nature is different from a proposal because in a proposal, without the conditions being fulfilled there is no contract but in a contingent contract, the performance of the contract cannot be demanded unless the uncertain future event takes place².

The Supreme Court of India has even gone further to distinguish between the impossibility of performance of contract and failure of the contract. Failure of a contract essentially means the non-happening of the anticipated future event while on the other hand impossibility to perform the contract is due to the occurrence of an unexpected event.³ The main three components of a contingency contract would entail the following: the contingency will be collateral to the

¹ Sweet and Maxwell, “*Chitty on Contracts – Volume I General Principles*” Thomson Reuters (2004)

² Jennifer Gerarda Brown, *Creativity and Problem-Solving*, 87 Marq. L. Rev. 697, 710 (2003-2004)

³ *Gian Chand v York Exports Ltd*, (2015) 5 SCC 609; (2015) 3 SCC (Civ) 189.

contract⁴, the contingency will depend upon the will of a person⁵ and the condition of contingency should be a precedent of the contract⁶. The ICA has also laid down provisions that determine when a contingent contract can be declared void. The contract becomes void according to Section 32 when, a contingent contract is created upon the happening of an uncertain future event, it becomes void if the said event becomes impossible. Along the same lines according to Section 33, a contingent contract made on the grounds of the non-happening of an uncertain future event automatically becomes unenforceable if the said future occurrence becomes impossible to take place. Contracts of insurance, indemnity, and guarantee are some of the examples for a contingent contract. In the famous case of *Chandulal Harjivandas v CIT*⁷, the court held that contracts of insurance and indemnity are contingent contracts.

NATURE OF WAGERING AGREEMENTS

The Indian Contract act on the contrary also has a provision for wagering agreements under Section 30. A wagering agreement is a ‘quasi-contract’ where amongst the two contracting parties, one party promises to pay money to the other party on the happening of an uncertain future event while the second party agrees to pay money on the non-happening of the uncertain future event. This way among the two parties, one would experience profit while the other experiences a loss. Under the Indian Contract Act, wager agreements are void⁸. The difference between a contingent contract and a wagering agreement was specifically explained in the famous case of *Carlill v Carbollic Smoke Ball Co*⁹ which explains wagering agreements as “if either of the party may win but cannot lose or may lose but cannot win, it is not a wagering agreement”. The important distinction here is that although all wagering agreements are contingent in nature, a contingent contract is never wagering.

Wager Agreements have been in existence for several decades, since primitive times. Therefore, laws on wagering agreements have been in place in most of the common law jurisdictions, specifically in England. Most of the common law countries have adopted the UK Gaming Act, 1845. The legislation in Australia, New Zealand, Malaysia, Singapore, etc has all

⁴ *Rojasara Ramjibhai Dahyabhai v Jani Narottamdas Lallubhai*, (1986) 3SCC 300: AIR 1986 SC 1912.

⁵ *Secy of State for India v A.J Arathoon* ILR (1869-70) 5 Mad 173

⁶ *Ramzan v Hussaini*, (1990) 1 SCC 104: AIR 1990 SC 529

⁷ *Chandulal Harjivandas v CIT* AIR 1967 SC 816

⁸ Barnett E. Randy “*Contract – Cases and Doctrine Fourth Edition*” Wolters Kluwer. Aspen Publishers (1995)

⁹ *Carlill v Carbollic Smoke Ball Co*. 1892 EWCA Civ 1

adopted laws on wager agreements from the laws enacted by the UK. In India, the gaming act influenced the Indian Contract Act in creating laws on wager agreements. The Indian Contract Act does not define what is wagering agreements anywhere, but they were given a new form of interpretation through the case, *Chimanlal Purushottamdas Shah v Nyamatrai Madhavlal*¹⁰, where the court explained that “the essence of gambling and wagering is so that one party is to win and the other is to lose upon a future event which at present is of uncertain nature – that is, if the events turn one way ‘A’ will lose, but if it turns out another way, he would win”.

NATURE OF CONTINGENT CONTRACTS AND ITS OBLIGATIONS

Since a contingent contract is in simpler terms a conditional contract, the contingent conditions can either be precedent or subsequent. It could be termed as precedent if the contract is not to be binding until the specified event occurs. On the other hand, it is subsequent if a previously binding contract is determining whether the event occurred or not¹¹. The obligations entailed in a contingent contract would bind the parties to the following conditions: before the event occurs, each party is eligible to withdraw from the agreement.¹² On the other hand, before the event happens, the main obligations have not accrued but as long as the event has the possibility of happening, the parties cannot withdraw.¹³ Thirdly, neither party must do anything to prevent the occurrence of the event.¹⁴

A wagering agreement in India on the other hand is declared void and not enforceable. The rationale behind this is that it is against public policy and morality. If made enforceable they would encourage illegal activities and hence they are prohibited to maintain the moral grounds of the society.

¹⁰ *Chimanlal Purushottamdas Shah v Nyamatrai Madhavlal* AIR 1938 Bom 44 (E)

¹¹ *Schweppe v Harper* (2008) ECWA Civ 442

¹² *Pym v Campbell* (1856) 6 E & B. 370.

¹³ *Smith v Butler* (1900) 1 QB. 694

¹⁴ *Mackay v Dick* (1881) 6 App Cas 251.

APPLICATION OF CONTINGENT CONTRACT AND THE NON-APPLICATION OF WAGER AGREEMENTS

Application of contingent contracts is best understood when we analyse the role it plays in commercial transactions¹⁵. One such important function is the insurance contracts which are contingent in nature. Insurance is essentially a form of contract to do something if a future event occurs, which would be contracted by the parties and the liability would be on the offeror. In all forms of insurance like, fire insurance, life insurance, car insurance, etc the offeror who is essentially an insurance company, offers to take up the risk of the offeree and for this, the offeree agrees to pay to the company a certain amount of premium/money.¹⁶ Every insurance for it to be valid requires the existence of an insurable interest. Without this, an insurance contract is no more than a wagering agreement and therefore it would be void. Insurable interest means the risk of loss against which the party is insured due to the happening of an enforceable future event. In contrast, in a wagering agreement, neither of the parties are running a risk of loss except for the one of the agreements itself One of its other manifestations is that a contingent contract can be similarly used in a contract of guarantee and warranty. This occurs usually when the supplier has no relationship with the counterparty. A contingent contract is also extensively used in areas of Mergers and Acquisitions where payments such as earn-outs, buyer stock, seller notes, etc are part of it.

Unlike these contracts, the perfect example of a wagering agreement would be any form of betting. Betting essentially entails the prediction of the outcome of a particular event, in this case, in the area of sports, through money. This act in India is illegal and is prevalent especially in the sport of cricket, specifically in the Indian Premier League (IPL). Although the Public Gambling Act 1867 criminalizes betting in India, the exception to this is under Section 30 of the ICA which states that “a contract entered into for or towards any form of plate, prize or money above five hundred rupees is to be rendered to the winner of any horse-race”. Similarly, lottery wins are also considered to be an exception to Section 30 of the ICA. Betting on any other format is completely illegal in India, and is an offense that is punishable under the eyes of the law. A contrary opinion of making the act of betting legal has been on the rounds in India for a while now. The 276th Law Commission’s Report essentially recommends India to legalize and regulate betting and gambling in India. After the betting scandal of 2013 in the Indian

¹⁵ Shaffer, Sherrill. "Production and Contingent Contracts: Comment." *Journal of Post Keynesian Economics* 6, no. 4 (1984): 634-36. <http://www.jstor.org/stable/4537854>.

¹⁶ *United India Insurance Co Ltd v Pushpalaya Printers*, (2004) 3 SCC 694: AIR 2004 SC 1700

Premier League, two committees were set up which is, the Mudgal Committee and the Lodha Committee¹⁷. Here, the committee suggested the legalization of betting in order to regulate the unfair practice that continues to exist, thereby giving the government better resources to tackle misuse and cheating. Similarly, in the case of *Board of Cricket Control for India v Cricket Association of Bihar*¹⁸, the supreme court made recommendations to the law commission to look into the issue of legalization of betting. What the commission report clearly indicates is that of the poor implementation of current laws which results in illegal betting and gambling taking place¹⁹. The law commission, therefore, recommends the creation of betting and gambling laws under Schedule seven of the constitution in order to legalize and regulate them. This way, these wager agreements would no longer be void but could be treated as valid contracts. It also additionally recommends setting up a licensing policy that would allow only the licence holders to take part in the activity of gambling and betting and prevent its misuse. This is also beneficial to the government as it would lead to additional income for the government through taxation. Most importantly, the commission also provided with clauses to make offences like match-fixing and sports frauds to be classified as a criminal offence and be penalized for the same.

CONCLUSION

To conclude, although wager agreements have been void since time immemorial, in order to protect the notion of morality, amendments for legalisation as suggested could help in reducing the abuse of laws and also lead to better management of such contracts. This way, a wagering agreement would function similarly to a contingent contract. It would ultimately give the government agencies much better control over such illegal and unfair activities. Secondly, legalizing it also has the additional benefit of acquiring additional income, which in my opinion caters as the most active and effective way to counter immoral activities that are taken up by bookies who try to influence players, thereby destroying the authenticity of the game.

¹⁷ Auroshree, “276th Law Commission Report on Legal Framework: Gambling and Sports Betting Including in Cricket in India”, SCC Online, (2018) <https://blog.scoonline.com/post/2018/09/05/276th-law-commission-report-on-legal-framework-gambling-and-sports-betting-including-in-cricket-in-india/>

¹⁸ *Board of Cricket Control for India v Cricket Association of Bihar* (2016) 8 SCC 535

¹⁹ Rohani Mahyera, *Saving Cricket: A Proposal for the Legalization of Gambling in India to Regulate Corrupt Betting Practices in Cricket*, 26 Emory Int'l L. Rev. 365, 410 (2012)

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